IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 989 OF 2002

Smt. Kamal Mahadeo Muley Occ.: Agriculturist & Household R/o : At Post Nivsar, Tal. Lanja, Dist. Ratnagiri.	]	APPELLANT (ORIGINAL PLAINTIFF).
Versus		
1) Konkan Railway Corporation Through Executive Director, Konkan Railway Bhavan, Vashi, New Mumbai. 2) Special Land Acquisition Officer, Konkan Railway -1, Collector Compound,Ratnagiri 3) The Collector, Ratnagiri.	]	RESPONDENTS (ORIGINAL DEFENDANTS).

Mr. R.D. Suryawanshi Advocate for Appellant.

Ms. Kiran Bhagalia with Ms. Asha Bhambani, Advocate for Respondent No. 1.

Mr. A.R. Patil, AGP for the Respondent no. 2 and 3.

CORAM : ABHAY S. OKA, J.

DATE : 24TH JULY, 2006

P.C.

1) I have heard the submissions of the learned counsel appearing for the parties. On 15th June 2006, by consent of the learned counsel appearing for the parties, the appeal was finally heard.

2) The Appellant is the original Plaintiff. The Appellant filed a suit for payment of compensation on account of the damage caused to her immovable property by the Respondents. The claim for damages is to the tune of Rs.1,93,000/-. A prayer was made in the suit for removal of encroachment made by the Respondents and in the alternative for compensation of Rs.65,000/-. The case of the Appellant is that she is a widow and is the owner of land bearing survey number 330 admeasuring 33 Are as well as land bearing survey number 334-A admeasuring 2 Hectare and 2 Are situated at Mauje Nivasar, Tal. Lanja, District Ratnagiri. According to the case of the Appellant, the area of 20 gunthas out of land bearing survey number 330 was acquired for public purpose at the instance of the first respondent. Similarly area of 84 gunthas out of land bearing survey no. 334-A was acquired for public purpose at the instance of first Respondent. Out of aforesaid two lands, the dispute in the suit is as regards area of 13 gunthas out of survey number 330 and area of 26 gunthas out of survey no. 334. The said portions of the land were not acquired on the date of the suit. The said portions of the land are hereinafter referred to as "the suit land". According to the case of the Appellant on the suit land there was one toilet block admeasuring 1.5 meter in width x 1.8 meter in length having height of 2 meter which was made up of simple walls and Mangalore Tiles. The total cost of the

toilet was stated to be Rs.1,200/-. According to her case there were 60 Jambhul trees on the suit land and the total cost of Jambhul trees was Rs.78,000/-. According to the Appellant there was a wall (gadga) made up of stones having height of 3 feet and length of 400 meters having total cost of Rs.80,000/-. According to the case of the Appellant, a PVC pipeline was laid on the suit land for bringing water from a Canal.

3) On 16th February 1993, the toilet block was demolished by the first Respondent after oral notice thereof given by a Junior Engineer of the first Respondent. The Junior Engineer recorded said fact on a chit and stated that compensation will be paid to the Appellant. He stated that the toilet block was required to be removed for facilitating movement of certain equipment. After demolition of toilet block without informing the Appellant, 60 Jambhul trees were destroyed by the first Respondent. According to the case of the Appellant, while constructing the Railway line on the adjoining portion of land which was acquired, large amount of earth was dumped on the suit land which covered the water pipeline and the wall constructed on the suit land. According to the Appellant for irrigating her other land she was drawing water from the suit land. As a result of the encroachment made by the respondent on the suit land, the water source was completely damaged and she was required to construct a well on her other property by

spending Rs.30,000/- which is at a distance of 2.5 kms. away from the other agricultural land of the Appellant. According to the Appellant out of land bearing survey no. 334 admeasuring 26 gunthas which is part of the suit land, an area of 13 gunthas cannot be used by her as a result of activities of first respondent. According to the Appellant a number of letters making grievances were written by her to the Respondents. For the first time by communication dated 3rd September 1997, the second Respondent informed that she has been already paid the compensation in respect of the acquired land and therefore she was not entitled to any compensation.

4) The first Respondent filed written statement. The first Respondent admitted that toilet block was in existence. However the first respondent disputed the price of toilet block. The first respondent disputed that there were Jambhul trees on the land and that there was a wall constructed and a pipeline laid. However there was no denial of the allegation that the suit land was not acquired in accordance with law. Apart from general denial, it was contended in the written statement that on 5th October 1995 the Appellant has been informed that for the extra area which was required for construction of Railway line a proposal is already submitted for acquisition and compensation will be paid in accordance with the provisions of the Land Acquisition Act, 1894. The

written statement was filed by 2nd and 3rd Respondents containing general denials. It was stated that though few trees were removed, the same was done with the prior approval of the Appellant.

5) The learned Trial Judge framed issues which are as under :

1) Does Plaintiff prove that defendants have cut off 60 Jambhul trees from the land of plaintiff which was not acquired and without her consent ?

2) Does she prove that defendants have damaged pipeline and compound wall as alleged ?

3) Whether she is entitled for damages as prayed ?

4) Whether she is entitled for the possession of the suit property as prayed ?

5) Whether she is entitled for further interest as prayed ?

6) What order and decree ?

2A) Whether this Court has jurisdiction to entertain and try the suit ?

2B) Whether suit is premature?

The same were answered as indicated below :

1) Does not survive,
2) Does not survive,
3) No,specifically under the present suit,
4) No
5) No
6) As per final order.
2A) No
2B) Yes.

6) The learned trial Judge held that acquisition proceeding in respect of area of 13 gunthas out of survey no. 330 and half guntha out of survey no.

334(A) were pending and the question of compensation will be decided in the said proceeding. The learned trial Judge held that as and when compensation is awarded, the Appellant will have a remedy under Section 18 of said Act to make a claim for enhancement. The learned Judge held that a Civil Suit was not maintainable for challenging acquisition proceeding. The learned Judge, however, did not record any specific finding on issue Nos. 1 and 2.

7) The learned Counsel for the Appellant submitted that the grievance of the Appellant in the suit was that without following due process of law, a part of the suit land was illegally taken over by the Respondents and the property therein was damaged. He submitted that suit was maintainable as there was no challenge in the suit to any acquisition proceeding under the said Act of 1894 but challenge was to the illegal acts of the Respondents of committing encroachment on the suit land without following due process of law. He submitted that there are clinching admissions made by the witness examined by the first Respondent and in view of the said admissions, the Appellant was entitled to a decree. He submitted that after the dismissal of the suit, the Appellant was supplied a copy of Award dated 31st October 2000 which is made under Section 11 of the said Act in respect of additional land out of the suit land. Though a formal application for additional evidence is not made, by

consent of the learned counsel appearing for the Respondents, a copy of the said Award is taken on record of the First Appeal which is marked as Article "X" and by consent of the counsel appearing for the parties the same has been read in evidence. The learned counsel for the Appellant pointed out that compensation has been awarded at the market rate prevailing on 27th August 1999 which is the date of publication of Notification under Section 4(1) of the said Act of 1894 and no compensation has been paid for loss or damage caused.

8) The learned Counsel appearing for the first Respondent submitted that as an award is already made under Section 11 of the said Act, now the remedy available for the Appellant was to apply under Section 18 of the said Act of 1894. She submitted that in substance, the challenge in the suit is to the award on the ground that compensation has been denied to the Appellant. She, therefore, submitted that the trial Court has rightly held that Civil Court had no jurisdiction to entertain the suit. She submitted that there is no merit in the appeal and the same deserves to be dismissed. The learned A.G.P. for the 2nd and 3rd Respondents adopted the submissions made by the learned Counsel for the first Respondent.

9) I have considered the submissions. I have perused the pleadings and notes of evidence. I have

also perused a true copy of the award which is produced on record. It is not in dispute between the parties that the suit land was not acquired as on the date on which the cause of action for filing the suit arose. On the date on which the suit was filed, the suit land was not the subject matter of any concluded acquisition proceeding. The Respondents have not challenged the title of the Appellant to the suit land. A copy of the award which is placed on record of the appeal shows that Notification dated 27th August 1999 was published under Section 4(1) of the said Act of 1894 by which a part of the suit land namely area of 13 Are out of survey 330 and 1/2 Are out of survey no. 334-A was notified for acquisition.

10) One Shri. Sudhir Madhav Kulkarni, a Sectional Engineer of the first Respondent was examined on behalf of the first Respondent admitted in his examination-in-chief that first Respondent used area of 13 and 1/2 gunthas out of the suit land for dumping purposes and the said area was not acquired earlier. He stated that there was a toilet / latrine on the said area of 13 and 1/2 gunthas and the area of the toilet was 1.5 meter x 1.8 meter having height of 2 meters. He stated that the approximate cost of the toilet block was Rs.500/-. He admitted that it was not possible to retain the said toilet block while constructing a tunnel on the nearby acquired land. In the cross examination, he admitted that the work of dumping on

area of 13 and 1/2 gunthas was carried out in the year 1993-1994. He admitted that the toilet block was demolished in the same year. He admitted that before dumping the material on the suit land, the first Respondent had not informed the Appellant in writing. He admitted that before the acquisition proceedings, first Respondent had not measured the un-acquired land. During his cross examination, he further stated that on the portion of the suit land used for dumping purposes, there were 30 to 40 Jambhul trees owned by the Appellant. He stated that he was unable to state whether the entire land of the Appellant was surrounded by a wall (gadga). He stated that the cost of compound wall on the acquired land was paid to the Appellant. He admitted that the flow of water on the suit land is now closed due to the construction of the Railway track and the tunnel on the adjoining land. He stated that he was not aware whether the Appellant had to spend Rs.30,000/- for digging a well due to closure of water flow. He admitted that first Respondent had not paid any compensation in respect of area of 13 and 1/2 gunthas out of the suit land which was used for dumping purposes. He volunteered that acquisition proceeding in respect of area of 13 and 1/2 gunthas was in progress. It is pertinent to note that his deposition was recorded on 31st August 2001 and still he did not disclose that award is allegedly made on 31st October 2000. It is also pertinent to note that the 2nd and 3rd Respondents did not examine any other witness and

did not lead any evidence regarding acquisition proceedings in respect of area 13 and 1/2 gunthas and about alleged award allegedly made in respect of the said area on 31st October 2000. Though the learned Counsel appearing for the parties were unable to throw any light on this aspect, it appears from Paragraph No. 9 of the impugned Judgment that certain documents were placed on record alongwith a list at Exhibit 89 to show that the acquisition proceeding was completed on 31st October 2000 and compensation has been awarded to the Appellant.

11) From the evidence on record the admitted position which emerges is as under:

(a) No acquisition proceeding was initiated in respect of the suit land till 27th August 1999 when a Notification under Section 4(1) of the said Act of 1894 was published;

(b) without acquiring the suit land an area of 13 and 1/2 gunthas was taken over by the first Respondent in the year 1993-1994 for dumping purposes;

(c) a toilet on the suit land was demolished in the year 1993-1994 and area of the toilet was 1.5 meter x 1.8 meter having height of 2 meters;

(d) There were 30 to 40 Jambhul trees in existence on the area used for dumping purposes by the first Respondent and the Jambhul trees were owned by the Appellant;

(e) flow of water to the suit land was closed due to construction of Railway track and tunnel on the adjoining land.

12) Thus it is crystal clear that the respondents illegally and un-authorisedly encroached upon area of 13 and 1/2 gunthas out of the suit land admittedly owned by the Appellant. The facts which are disputed are as under :

i) The existence of a compound wall (gadga) along the boundary of the suit land.

ii) The exact number of Jambhul trees owned by the Appellant on the suit land which were destroyed by the first Respondent.

iii) Existence of a PVC pipeline on the suit land which was allegedly damaged by the first Respondent.

iv) The flow of water on the suit land was utilised by the Appellant as a source of water

supply to her other land.

(v) The Appellant was forced to construct a well on other land by spending Rs.30,000/-.

13) So far as Jambhul trees are concerned, the case of the Appellant was that there were 60 Jambhul trees which were destroyed due to dumping. The witness examined by the first Respondent admitted that there were 30 to 40 Jambhul trees on the area of 13 and 1/2 gunthas. Thus the correct position which can be safely taken is that 40 Jambhul trees on the suit land were destroyed as a result of dumping by the first Respondent. The Appellant's son entered the witness box and stated that there were 60 Jambhul trees of 20 to 25 years age and total cost of the trees was Rs.78,000/-. He also deposed that a PVC pipeline on the suit land was destroyed and existing compound wall having length of 400 meters and height of 3 ft. was destroyed due to dumping. He produced on record accounts maintained regarding the expenditure incurred on digging the well. However, the said accounts were not exhibited by the learned trial Judge. The Appellant also examined one Narayan Yashwant Shinde in support of her case who also deposed about existence of Jambhul trees by saying that there were 70 to 80 Jambhul trees. He also deposed about existence of PVC pipeline on the suit land.

14) The witness examined by the first Respondent Shri. Sudhir Madhav Kulkarni did not deny in the examination-in-chief that compound wall was not in existence. In his examination-in-chief he stated that during the earlier acquisition proceedings, compensation was paid in respect of the compound wall which was found during joint measurement. In cross examination he admitted that cost of compound wall which was paid to the Appellant was only in respect of the gadga of the acquired land. Thus the first Respondent has not denied in the evidence that a compound wall having length of 400 meters and height of 3 ft. made up of stones was in existence on the suit land and that the same was destroyed as a result of dumping. There is a consistent evidence led by the Appellant regarding the existence of said wall and covering of the said compound wall by dumping. Therefore the case of the Appellant that there existed a compound wall made up of stones having length 400 meters and height of 3 ft. on the suit land will have to be accepted. It will have to be also accepted that the said compound wall was destroyed due to dumping. However, there is no satisfactory evidence regarding the costs incurred by the Appellant on construction of the said wall.

15) So far as the dispute regarding exact number of destroyed Jambhul trees is concerned, the case made out by the witness examined by the first Respondent about

the existence of 40 trees will have to be accepted. The Appellant has specifically come out with the case that the cost of each tree was Rs.1300/- as each tree was sufficiently old. When the first Respondent admitted that 40 trees were destroyed, the case of Appellant regarding value of Jambhul trees should have been controverted in evidence. However that is not done by the first Respondent. Therefore, it will have to be accepted that 40 Jambhul trees were destroyed due to dumping on the suit land and cost of each tree was Rs.1300/-. In the examination-in-chief, the witness Shri. Sudhir Kulkarni examined by the first Respondent has not denied existence of PVC Pipeline on the suit land. However, in cross examination he has denied existence of the said pipeline. There is no positive evidence on record to show the existence of PVC pipeline. There is no evidence on record to show that because of obstruction to the flow of water on the suit land, the Appellant was forced to construct well on other land. Thus, on the basis of the aforesaid discussion, following findings of fact will have to be recorded.

(1) In 1993-1994 the first Respondent encroached upon area of 13 gunthas out of survey no. 330 and area of 1/2 guntha out of survey number 334-A owned by the Appellant by acts of dumping.

(2) The toilet block having value of Rs.500/-was destroyed due to act of dumping.

(3) 40 Jambhul trees of the Appellant having cost of Rs.1300/- each were destroyed due to dumping.

(4) A compound wall having height of 3 ft. and length of 400 meter made up of stones was destroyed due to dumping. However, there is no positive evidence regarding cost of the said compound wall.

16) That takes me to the other dispute regarding jurisdiction of the Civil Court to entertain the suit in the light of the fact of completion of acquisition. Perusal of the Award shows that market value has been fixed as on 27th August 1999 and interest under Section 23(1)(A) of the said Act of 1894 has been granted from 27th August 1999. The award also records that acquired land has been taken over by the first Respondent by a private agreement and therefore acquiring body will have to pay rent to the owner. However, the award is only as regards the market value of the area of 13 and 1/2 gunthas as on 27th August 1999, interest at the rate of 12% per annum under Section 23(1)(A) of the said Act of 1894 from 27th August 1999 on the market value and solatium under Section 23(2) of the said Act of 1894 on the market value.

17) On perusal of Section 23 and Section 24 of the said Act of 1894 it appears that there is no provision in the said Act of 1894 for grant of compensation for use of the land prior to initiation of acquisition proceeding i.e. prior to the publication of a Notification under Section 4(1) of the said Act of 1894. Interest under Section 34 of the said Act of 1894 can be granted wherever possession is taken over by the Collector under the provisions of the said Act of 1894 before the payment of compensation or deposit of the compensation. In this case possession of area of 13 and 1/2 guntha is not taken over by the Collector or by any Officer of the State Government in exercise of powers conferred by the said Act of 1894. In fact when possession was taken over, a Notification under Section 4(1) was not even issued. There is no evidence on record to show that the possession was taken over as a result of private negotiations. Evidence on record shows that the Appellant was forcibly dis-possessed of area of 13 and 1/2 gunthas. The 40 Jambhul trees, the toilet block and the compound wall were not in existence on the date on which Notification under Section 4(1) of the said Act of 1894 was issued and therefore in view of express language of Section 23 of the said Act of 1894, the Appellant will not be entitled to any compensation under the provisions of the said Act of 1894 as regards the 40 Jambhul trees, the toilet block and the compound wall.

18) It is true that the said Act of 1894 is a complete code by itself which provides for payment of compensation on account of acquisition of a private land for public purpose. The authorities under the said Act of 1894 have no power to determine and award compensation, on account of loss of a property in a case where before publication of Notification under Section 4(1) of the said Act of 1894, the owner is dis-possessed of his property otherwise than by due process of law. Similarly no compensation can be awarded under the said Act of 1894 on account of destruction of the structures and trees made without following due process of law which has taken place before publication of a Notification under Section 4(1).

19) The prayer in the suit is for payment of compensation on account of damage caused by illegal act of trespass on the part of Respondents. The Civil Court does have jurisdiction to entertain a suit for grant of the said prayer. The second prayer is for delivery of possession. It is not in dispute that the Respondents are claiming that the acquisition is made only in respect of 13 and 1/2 gunthas which is the subject matter of the suit. It is obvious that now a prayer for possession of the said area is not maintainable in a Civil Suit. As regards remaining area out of the suit land, the Respondents are not

claiming any right and are not disputing in any manner that the Appellant is in possession thereof. Therefore, second prayer in the plaint will not survive. So far as third prayer is concerned, the same will survive so far as the interest on claim for damages is concerned.

20) The Trial Court has not at all considered the prayers of the Appellant in first and third prayer clauses on merits. In my view the suit will have to be remanded to the trial Court for deciding the issue as regards entitlement of the Appellant to claim of damages with interest from the first Respondent. The said issue will have to be decided on the basis of evidence which is already adduced by the parties. However both the parties are free to lead further evidence as regards the cost of the destroyed wall. The said issue will have to be decided in the light of what has been held in this judgment. Hence, I pass following order :

O R D E R

i) The impugned Judgment and Decree is set aside.

ii) The suit is remanded back to the trial Court. The suit will be decided afresh in accordance with the observations made in the judgment. The parties are directed to appear before the learned trial Judge on

21st August 2006 at 11.00 a.m. It is made clear that no further notice will be given to any of the parties.

iii) The learned trial Judge is directed to hear and decide the suit as expeditiously as possible and preferably on or before 31st January 2007.

iv) There will be no order as to costs.

(v) Writ to be sent forthwith. This Order to be communicated by fax / e-mail to the concerned Court.

(ABHAY S. OKA, J.)